



SUPPLEMENTAL

COUNCIL AGENDA: 06-23-09
ITEM: 6.2 (c)

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

**SUBJECT: DBE IMPLEMENTATION
AGREEMENT**

DATE: 06-17-09

Approved

Date

6/18/09

SUPPLEMENTAL

RECOMMENDATION

Adoption of a resolution ratifying the City Manager's execution of a California Department of Transportation implementation agreement setting forth the disadvantaged business enterprise program that the City of San José must implement as a condition of receiving federal funding for roadway projects.

OUTCOME

The City Council's ratification of the California Department of Transportation (Caltrans) agreement – which the City Manager has already executed – will confirm the City's agreement to implement the disadvantaged business enterprise (DBE) program described herein. The City Manager's execution of the agreement enabled the City to meet federal funding requirements and timelines necessary to advertise for bids for the street resurfacing project discussed above in Item 6.2(a) of this Council Agenda. Moreover, ratification of the agreement will enable the City to obtain federal funding for future roadway projects.

BACKGROUND

Before 2005, Caltrans complied with federal funding conditions by requiring local agencies to implement DBE programs that included race-conscious means. The race-conscious means consisted of setting goals for minority contractor participation and requiring the general contractor to show good-faith efforts to meet the goals if the goals were not met.

In 2005, the Ninth Circuit Court of Appeals in *Western States Paving v. Washington State Department of Transportation* held that the federal DBE program enacted by Congress was constitutional but that Washington State's implementation of the program was unconstitutional. The court held that to comply with the federal program state and local governments were responsible for determining whether or not there was actual discrimination in the local transportation contracting industry and for developing narrowly tailored measures if a need

existed. The Ninth Circuit concluded, among other things, that the “disparity” study relied upon by Washington State was insufficient to establish actual discrimination.

In response to the *Western States Paving* decision, the United States Department of Transportation revised its DBE program so that states located in the Ninth Circuit would only need to implement race-neutral measures if they did not have a study containing sufficient evidence of actual discrimination. As a result, in 2006 Caltrans suspended the race-conscious element of its DBE program pending completion of a new “disparity” study that would comply with the requirement of demonstrating actual discrimination.

Since March 2006, Caltrans has required the City to implement a race-neutral DBE program in order to obtain federal funds. The program has consisted of the City annually establishing an estimated DBE participation level and then using a variety of race-neutral measures to try to achieve the established participation level. The race-neutral means include, but are not limited to, the following: (1) advertising solicitations as broadly as possible, (2) scheduling bidding periods and opening times and packaging quantities, specifications and delivery schedules in ways that facilitate use of DBEs and other small businesses, (3) helping DBEs and other small businesses obtain bonding and financing, (4) providing technical assistance to DBEs and small businesses, (5) providing information on contracting procedures and specific contract opportunities, (6) providing support services to develop and improve immediate and long-term business management, record keeping and financial and accounting capability for DBEs and other small businesses, (7) assisting new start-up firms particularly in fields which DBE participation has historically been low, and (8) assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

In 2007, Caltrans completed a new “disparity” study that it believes meets the stringent requirements set forth in the *Western States Paving* decision for demonstrating actual discrimination against contractors who are African American, Asian Pacific American, Native American and women. As a result, effective June 2, 2009, Caltrans is requiring the City – as well as other entities – to execute an agreement to implement a DBE program that contains race-conscious, as well as race-neutral, measures as a condition of receiving federal funding for roadway projects. It is this agreement that staff is requesting the City Council to ratify.

ANALYSIS

1. DBE Implementation Agreement

In order to obtain federal funding for roadway projects, Caltrans is requiring the City to enter into a Disadvantaged Business Enterprise Implementation Agreement for the City of San José (Implementation Agreement). As with similar agreements entered into by the City over the past several years, the Implementation Agreement requires the following: (1) that the City annually establish anticipated DBE participation levels, and (2) that the City use a variety of race-neutral means to meet the established anticipated DBE participation level. The race-neutral means

identified in the Implementation Agreement are the same as those set forth in previous agreements.

The Implementation Agreement differs from the agreements entered in the past several years in that it requires the City to implement race-conscious means to meet any portion of the established anticipated DBE participation level that the City cannot meet through the race-neutral means. Based on the "disparity" study completed by Caltrans, the race-conscious means apply to DBEs that are owned and controlled by African Americans, Native Americans, women and Asian Pacific Americans. The race-conscious means involve the City establishing contracting goals for the use of these categories of DBEs and, for contractors not meeting the goals to show they used good faith efforts to meet the goals.

2. Ratification of the Implementation Agreement is Necessary

The City Manager executed the Implementation Agreement on Thursday, June 11, 2009, in order to obtain federal funding for the resurfacing project that is the subject of Item 6.2(a) on this City Council Agenda. The City Manager executed the Implementation Agreement pursuant to the authority contained in Resolution No. 74887. That resolution authorized the City administration to apply for Federal American Recovery and Reinvestment Act funds for the Federal Recovery Act Tier I Resurfacing project, and to negotiate and execute any documents necessary to accept any such funds awarded to the City. The City Manager needed to execute the Implementation Agreement last week so that the City could obtain the necessary clearance from Caltrans to advertise and award the contract by early July.

The City Council's ratification of the Implementation Agreement is necessary because it applies to more than just the resurfacing project discussed in Item 6.2(a). The Implementation Agreement is necessary for the City to obtain federal funding on any future roadway projects. Accordingly, staff requests the City Council to ratify the City Manager's execution of the Implementation Agreement so that there is no question about the City's agreement to implement the DBE program contained therein.

3. Legal Challenge to Race-Conscious Means

As part of staff's request for the City Council to ratify the Implementation Agreement, it is important for the City Council to be aware that there is already a legal challenge to the race-conscious means contained therein.

The Associated General Contractors of America of San Diego filed a lawsuit against Caltrans asserting that the race-conscious portion of the DBE program contained in the Implementation Agreement violates the equal protection clause of the United States Constitution, a variety of federal civil rights statutes and the anti-discrimination provisions of the California Constitution. The essence of the lawsuit is that the "disparity" study completed by Caltrans is inadequate to meet the requirement of demonstrating racial discrimination against African Americans, Native Americans, women and Asian Pacific Americans. It alleges that the DBE program contained in

the Implementation Agreement improperly requires contractors to use race- and sex-based preferences as a factor in the award of construction contracts at the expense of other persons not in one of the preferred classifications. The Associated General Contractors of America is seeking injunctive relief.

The City will closely monitor the legal challenge made by the Associated General Contractors of America of San Diego and keep the City Council apprised of its status. In the meantime, staff recommends ratifying the Implementation Agreement so that the City can maximize its opportunity to obtain federal funds for roadway projects.

EVALUATION AND FOLLOW-UP

The proposed action will not require any further follow-up from staff. All prospective advertisements and solicitations for construction bids and consultant proposals with US DOT-assisted funds will include applicable Caltrans Local Assistance Procedures Manual language.

POLICY ALTERNATIVES

Alternative #1: Do not ratify the Implementation Agreement.

Pros: Reduces the amount of time staff needs to calculate and prepare the annual AADPL, reduces paperwork needed to be submitted to Caltrans for approval and reduces amount of forms and paperwork contractors and proposers are required to submit.

Cons: Will not allow the City to apply for or receive US DOT funds.

Reason for not recommending: The City would not be eligible to apply for or receive US DOT funds.

COORDINATION

This recommendation has been coordinated with the Department of Transportation, the City Manager's Office and the City Attorney's Office.



KATY ALLEN

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For questions, please contact NINA GRAYSON, OFFICE OF EQUALITY ASSURANCE, at 408-535-8455.